

VZCZCXRO4335
RR RUEHNZ
DE RUEHWL #0064/01 0530316
ZNR UUUUU ZZH
R 220316Z FEB 08
FM AMEMBASSY WELLINGTON
TO RUEHC/SECSTATE WASHDC 5089
INFO RUEHBY/AMEMBASSY CANBERRA 5113
RUEHNZ/AMCONSUL AUCKLAND 1630
RUEHDN/AMCONSUL SYDNEY 0647
RUEATRS/DEPT OF TREASURY WASHDC
RUCPDOG/USDOC WASHDC 0213

UNCLAS SECTION 01 OF 03 WELLINGTON 000064

SIPDIS

SIPDIS

SENSITIVE

STATE FOR EAP/ANP, EEB/TPP/IPE JBOGER, STATE PASS TO USTR JENNIFER GROVES AND COMMERCE FOR CASSIE PETERS ITA/MAC/OIPR

E.O. 12958: N/A

TAGS: [ECON](#) [ETRD](#) [KIPR](#) [NZ](#)

SUBJECT: 2008 SPECIAL 301 REVIEW - NEW ZEALAND

REF: STATE 9475

1. (SBU) Summary: Post recommends that New Zealand (GNZ) not/not be placed on the Special 301 List in 2008. The country's overall commitment to the protection of intellectual property (IPR) is relatively high as compared to most countries cited in the Special 301 review. Despite the slower than anticipated pace of legislative progress, the government remains committed to updating its intellectual property laws to ensure compliance with international standards, with planned revisions of the Patents Bill and the Copyright Amendments Bill ("New Technologies and Performers' Rights Bill") progressing through the legislative queue. Some momentum has been lost over the past year due to slowdown in the legislative agenda as the Government shifts its attention to upcoming elections in 2008. Though New Zealand generally provides adequate and effective protection of intellectual property rights (IP) under current law, Post will continue to engage Members of Parliament, the Ministry of Economic Development and local IP industry in order to press our concerns that pending legislation reflects international IP standards and passage occurs in a timely fashion. To date issues raised about the draft Copyright Bill by IP industry are being considered by the government and will be monitored by Post. It's reasonable to anticipate a renewed commitment to the passage of IP legislation by the GNZ post election cycle. Placing New Zealand on the Special 301 list at this stage may prove to be counter-productive as it likely will result in a defensive rather than consultative exchange. End summary.

International Intellectual Property Alliance (IIPA)'s Special Mention of New Zealand's IP Regime

2. (U) As IIPA noted in its Special 301 submission, that the Commerce Committee of the New Zealand Parliament issued its long-awaited report on the Copyright (New Technologies and Performer's Rights) Amendment Bill in July 2007. This extensive proposed amendment to New Zealand's copyright law contains many valuable improvements but some provisions remain problematic for industry. Post agrees with IIPA's recommendation that an effective course of action would be to continue to engage the government in order to ensure that the draft legislation provides more useful tools for dealing with piracy. Post has presented the list of noted shortfalls in the draft legislation to Minister Tizard (Consumer Affairs), Minister Goff (Trade) and to officials within the Ministry of Economic Development, the agency primarily responsible for drafting legislation and monitoring IP enforcement. Post remains engaged with Bronwyn Turley, Senior MED Policy Advisor for IP issues to maintain a dialogue to address the needed technical corrections.

GNZ Response to IIPA Submission

¶3. (U) The Copyright Bill is currently part way through its second reading in the New Zealand Parliament. The concerns raised by IIPA regarding the Bill's shortcomings are currently being considered by the government. Paragraphs 4 to 15 below summarize legislation intent and language in highlighted provisions of the draft Copyright Bill that have been brought to GNZ's attention by the IIPA. Detailed drafts of legal texts and proposed revisions to the Copyright Bill can be forwarded separately from MED if required.

Anticipated Treatment of TPMs under Proposed Bill -----

¶4. (U) Per MED, development and employment of TPMs have raised issues beyond the realm of copyright law for GNZ. They often relate to disclosure issues, such as insufficient or incorrect information to consumers concerning technological protected materials and their usability restrictions, and could often be addressed by contract law, privacy laws or consumer protection laws. The issuer of a TPM would still need to comply with those other existing laws as the TPM provisions do not 'trump' any other laws. Copyright owners can continue using TPMs that control access, however, without assistance from the Act. Owners could, for example, continue to rely on other legal measures, such as the law of contract, where an access protection measure is circumvented.

¶5. (U) GNZ notes that the WIPO Copyright Treaty 1994, to which New Zealand is not a party yet, not only calls for nations to "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures" but also recognizes "the need to maintain a balance between the rights of authors and the large public interest, particularly education, research and access to information" in updating international

WELLINGTON 00000064 002 OF 003

copyright norms to respond to challenges arising new technologies. GNZ feels that the translation of this balance into domestic laws is a matter of national circumstances and domestic policies, and parties to this treaty have implemented the TPM provision in different ways.

ISP liability limitation -----

¶6. (U) Per MED, the Bill contains provisions which limit ISP liability for copyright infringement by third parties. Copying is a central function of the internet and the services provided by ISPs. Material may be reproduced at many stages during the course of a transmission and it can be virtually impossible to identify when and where many of these copies are made. When the material being copied is subject to copyright protection, an ISP could face liability for both primary and secondary infringement of copyright. There is a public interest in ensuring cost-effective access to the internet, which may be affected by uncertain or increased liability for ISPs.

¶7. (U) The Select Committee made some changes to the ISP provisions. It removed the provision that limits ISP liability only when the ISP had adopted and reasonably implemented a policy relating to termination of the accounts of repeat infringers. A number of submitters raised concerns about this provision, including that it was unnecessary (because standard ISP terms and conditions generally already allow for this) and that its scope and application were quite unclear.

¶8. (U) Drafting changes were made to the provisions in new sections 92B and 92C which preserve the ability for a copyright owner to seek injunctive relief. These changes were suggested by the specialist advisers to the Committee and arose out of concern that the provisions were not drafted in a way that would effectively preserve the ability for a copyright holder to seek an injunction against an ISP.

¶9. (U) Changes were made to section 92C (2) at Select Committee and new sections 92CA and 92CB were added. These changes arose out of recommendations by the specialist advisers to the Committee.

Section 92C previously specified that an ISP is not infringing unless they know or have reason to believe that the material is infringing, and do not delete or prevent access to the material as soon as possible after they become aware. Concern was raised by the advisers that this test did not provide sufficient certainty for ISPs about when they would be required to take material down, and that it diverged from the tests used in other jurisdictions. In response to these concerns, the following changes were made:

-- The test was altered to clarify that the ISP must either know or have received a notice that the material was infringing;

-- There is a new requirement that notices must be properly completed, signed and in the prescribed form;

-- There is a new offence for knowingly or recklessly providing a notice that is materially false or misleading.

Access to Pharmaceuticals and Patent Protection

¶10. (SBU) While the U.S. pharmaceutical industry (PhRMA) urges that New Zealand be placed on the priority watch list (PWL) in 2008, post continues to believe that the industry's restricted access to New Zealand's market stems primarily from the cost containment strategies for subsidized drugs that are a part of the National Medicines Strategy (NMS). The government affiliated Pharmaceutical Management Agency (PHARMAC) is mandated to spend less than its budget allows, and the pharmaceutical industry has a number of legitimate complaints about its treatment in the purchasing process.

However, these industry concerns are not IP problems per se. While Post will continue to work to improve access for U.S. pharmaceuticals in the New Zealand market, we believe this should be dealt with as a market-access barrier and not as a failure to protect intellectual property. Even the pharmaceutical industry trade association here, Researched Medicines Industry Association of New Zealand (RMI - affiliated with PhRMA), assesses that the government's practices do not violate its TRIPS commitments. Post will continue to engage appropriate Ministers and MED to find ways to improve market access.

¶11. (SBU) While the new draft Patent Bill unfortunately has remained on the parliamentary docket for some time now, sources at the Ministry of Economic Development claim the Bill will meet

WELLINGTON 00000064 003 OF 003

international IP legislative standards. Modeled largely after current British patent law, the GNZ drafters had hoped to capture the UK's experience in structuring its revised patent regime to EU standards. An unofficial preliminary draft version of the bill, called an "exposure draft," was initially released in 2005 and received only technical comments as to the form of the bill. These have been reviewed and applied as appropriate. Despite the bill's long gestation period, MED attorneys responsible for drafting feel that the bill is likely to pass with little additional modification.

Under current law, the level of IP protection for pharmaceuticals remains adequate. Post does agree that it is in New Zealand's and our best interests to complete work on the draft Patents Bill promptly in order to ensure that New Zealand's patent regime reflects international standards. Post believes the better course of action is to continue to work/consult with the GNZ to ensure industry's concerns are reflected in pending legislation.

Enforcement

¶12. (U) GNZ remains committed to enforcing its IP laws adequately and effectively. In most instances, the government responds to complaints raised by rights holders against IP infringers. The government set up a new office within New Zealand Customs in 2007 that is exclusively dedicated to IP enforcement issues. Currently, New Zealand Customs can confiscate and destroy pirated products if the holder of the trademark or copyright has requested that Customs detain the goods. That request is valid for five years and can be renewed. Almost all the infringing goods imported into New Zealand originated in Asia, particularly China, and most of the intercepted

and investigated goods were clothing, footwear and headwear. The number of pirated CDs and DVDs intercepted by Customs has declined sharply, after peaking in 2006. While it appears that CDs and DVDs are increasingly being copied to order within New Zealand, making detection of local production increasingly difficult, industry as an ongoing cooperative dialogue with local authorities to better police IPR as new forms of piracy are detected.

¶13. (U) Conclusion: Post maintains that, despite certain technical deficiencies and delays in the pending intellectual property laws, there remains a strong commitment on the part of the GNZ to continue to improve its IP regime and bring it into conformance with international standards. GNZ's enforcement of current IP laws also reflects the government's proactive stance as they learn and adapt to help stem new forms of piracy. While there is additional work to be done to strengthen the law and enhance enforcement, Post recommends the better course of action is to continue engagement with the GNZ and monitor the progress of IP legislation rather than place New Zealand on this year's watch list. End conclusion.

MCCORMICK